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19 UNITED STATES DISTRICT COURT

20 NORTHERN DISTRICT OF CALIFORNIA

21 SAN FRANCISCO DIVISION

22 UNITED STATES OF AMERICA,

23 Case No.: 3:20-cr-00371-WHA

24 Plaintiff,

25 v.
26 UNITED STATES' RESPONSE TO
27 DEFENDANT'S MOTION FOR A COMPETENCY
28 HEARING

29 ROBERT T. BROCKMAN,

30 Date: January 12, 2021

31 Defendant.

32 Time: 2:00 PM

33 The United States respectfully responds to Defendant's motion for a competency hearing (ECF
34 No. 64) (the "Motion"). The government agrees that there must be a competency hearing, but the
35 hearing should not be scheduled in isolation. Instead, the Court should issue a scheduling order that
36 dictates when Defendant must produce competency-related discovery, how long the designated experts
37 will have to review the discovery and evaluate Defendant, when their expert reports will be due and,
38 finally, when the competency hearing will be held. Although the Motion correctly concludes that the
39 Court must hold a competency hearing on its record, it omits significant legal and factual context.

1 **I. THE COURT MUST GRANT THE MOTION, BUT ESCHEW ITS PROPOSED ORDER**

2 In passing the Insanity Defense Reform Act of 1984, Congress codified the procedures related to
 3 competency at 18 U.S.C. §§ 4241 & 4247, and the Court must follow this statutory framework through
 4 the adjudication of Defendant’s competency claim. Section 4241(a) (and constitutional due process)
 5 requires a competency hearing whenever “there is reasonable cause to believe that a defendant may
 6 presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent
 7 that he is unable to understand the nature and consequences of the proceedings against him or to assist
 8 properly in his defense.” As the Motion explained, the threshold for holding a competency hearing is
 9 low, and it is satisfied in this case. What the Motion did not explain is that the hearing is hardly the first
 10 step of the process. Although Defendant may prefer to hold a prompt hearing based only on the
 11 opinions of experts he retained and testimony from his wife and friends, the applicable statutory
 12 framework contemplates a more searching review of Defendant’s claim. In any criminal case, but
 13 especially in a case where the defendant continued to run a multibillion-dollar company, Reynolds &
 14 Reynolds (“Reynolds”), for almost two years after his alleged diagnosis, and stepped down only after he
 15 was indicted, it would be unwise for a court to rush into a competency hearing with expert evidence
 16 from only the criminal defendant.

17 Section 4241(b) gives the Court discretion to “order that a psychiatric or psychological
 18 examination of the defendant be conducted,” and Section 4247(b) establishes statutory requirements for
 19 such examinations. For example, competency examinations must be conducted by “a licensed or
 20 certified psychiatrist or psychologist, or, if the court finds it appropriate, by more than one such
 21 examiner.” 18 U.S.C. § 4247(b). The statute also vests the Court with discretion to “commit the person
 22 to be examined for a reasonable period, but not to exceed thirty days, . . . to the custody of the Attorney
 23 General for placement in a suitable facility.” *Id.* A custodial placement is appropriate in cases where
 24 malingering is a concern, as it allows trained Bureau of Prisons mental health professionals and staff to
 25 observe defendants in both clinical and non-clinical settings for a prolonged period of time. As
 26 Defendant has already retained and been evaluated by his experts, the government should have the same
 27 opportunity for its experts to evaluate Defendant. The Court should also appoint its own expert and/or
 28 remand Defendant to one of the BOP facilities that conducts competency evaluations (there is such a

1 facility at FMC Fort Worth in Texas). The Court should not schedule any competency hearing until it
 2 has determined which experts will have the opportunity to examine Defendant, draft expert reports, and
 3 present their finding at the hearing.

4 The Court as factfinder, as well as every expert that evaluates Defendant and offers a view of his
 5 competency, should be afforded the benefit of all relevant evidence in deciding this matter. Therefore,
 6 before scheduling a hearing, the Court will first need to decide associated discovery matters related to
 7 the proceedings. On November 19, 2020, the government requested relevant medical information from
 8 Defendant and, on December 10, the defense team indicated that it viewed the attachments to the Motion
 9 as the whole of its discovery and does not intend to produce anything further.¹ If Defendant persists in
 10 his insistence of hiding relevant evidence from evaluating experts and the Court, the government will
 11 issue a subpoena, and request the Court to order their production under 45 C.F.R. § 164.512(e), which
 12 excepts from HIPPA's privacy protections disclosures made in connection with "judicial and
 13 administrative proceedings," and Fed. R. Crim. P. 17(c)(1), which will allow early production to ensure
 14 evaluating experts have sufficient time to review the records before making their conclusions and
 15 writing their expert reports. Any expert evaluator will need to review the historical medical records
 16 requested by the government in order to comply with the statute's requirement of producing an expert
 17 report to the Court. *See* 18 U.S.C. § 4247(c)(1) (requiring the report to include "the person's *history* and
 18 present symptoms") (emphasis added).

19 In sum, the government requests that the Court issue a scheduling order for the requested
 20 competency hearing which also includes deadlines for discovery, evaluation of the discovery by experts,
 21 evaluations and testing of Defendant by government (and Court-appointed) experts, and submission of
 22 Section 4241(c) expert reports.

23 **II. STATUTORY POST-HEARING PROCEDURES**

24 As discussed above, holding a competency hearing is not the first step in adjudicating
 25 competency. It is also not the last. The post-hearing procedural landscape will depend on whether the
 26

27 ¹ In its letter, the government also noted that it would request an order for production if
 28 Defendant did not produce them voluntarily, and recommended Defendant start gathering them in the
 meantime to avoid subsequent delay. Ex. 1.

1 Court finds Defendant competent by a preponderance of evidence. If the Court finds Defendant
2 competent, proceedings will commence.² If the Court finds Defendant incompetent, under the
3 applicable statute, it must remand him to custody for further evaluation.³ *See* 18 U.S.C. § 4241(d)
4 (“[T]he court shall commit the defendant to the custody of the Attorney General.”). The Attorney
5 General, in turn, “shall hospitalize the defendant for treatment in a suitable facility . . . for such a
6 reasonable period of time, not to exceed four months, as is necessary to determine whether there is a
7 substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings
8 to go forward” The statute provides for further hospitalization “. . . for an additional reasonable
9 period of time until (A) his mental condition is so improved that trial may proceed, if the court finds that
10 there is a substantial probability that within such additional period of time he will attain the capacity to
11 permit the proceedings to go forward; or (B) the pending charges against him are disposed of according
12 to law; whichever is earlier.” *Id.* In sum, § 4241(d) “provides for a mandatory commitment of a
13 defendant, who has been deemed incompetent, for study of the defendant’s potential for restorability to
14 competence.” *United States v. LKAV*, 712 F.3d 436, 441 (9th Cir. 2013) (comparing § 4241(d) to the
15 permissive commitment, observation and study regime applicable to juveniles).

16 | III. FACTUAL BACKGROUND

17 The Motion suggests that Defendant first complained of symptoms before he developed a motive
18 to malinger, that he has been unable to assist his attorneys and alerted them of his symptoms only to aid
19 their working relationship, and that his symptoms are confirmed by a team of esteemed doctors. The
20 Motion also suggests that the government acted in bad faith for declining Defendant's invitation to
21 investigate his claims pre-indictment. Considering the context of Defendant's claims, when compared
22 to other contemporaneous events, and the fact that Defendant remained CEO of Reynolds until after he
23 was indicted, his claims are deserving of healthy skepticism. Only sunlight on Defendant's historical

25 ² Unless Defendant raises it in time to be considered along with his competency claim, the Court
should decline to entertain a future claim of physical incapacity that is brought only after the Court finds
him competent. To be clear, the government does not believe Defendant suffers from physical
incapacity that would bar prosecution. On the contrary, his record of pre-pandemic leisure travel
suggests the opposite is true. Nonetheless, the government raises this issue now to avoid any
unexpected surprises after the conclusion of the upcoming competency hearing.

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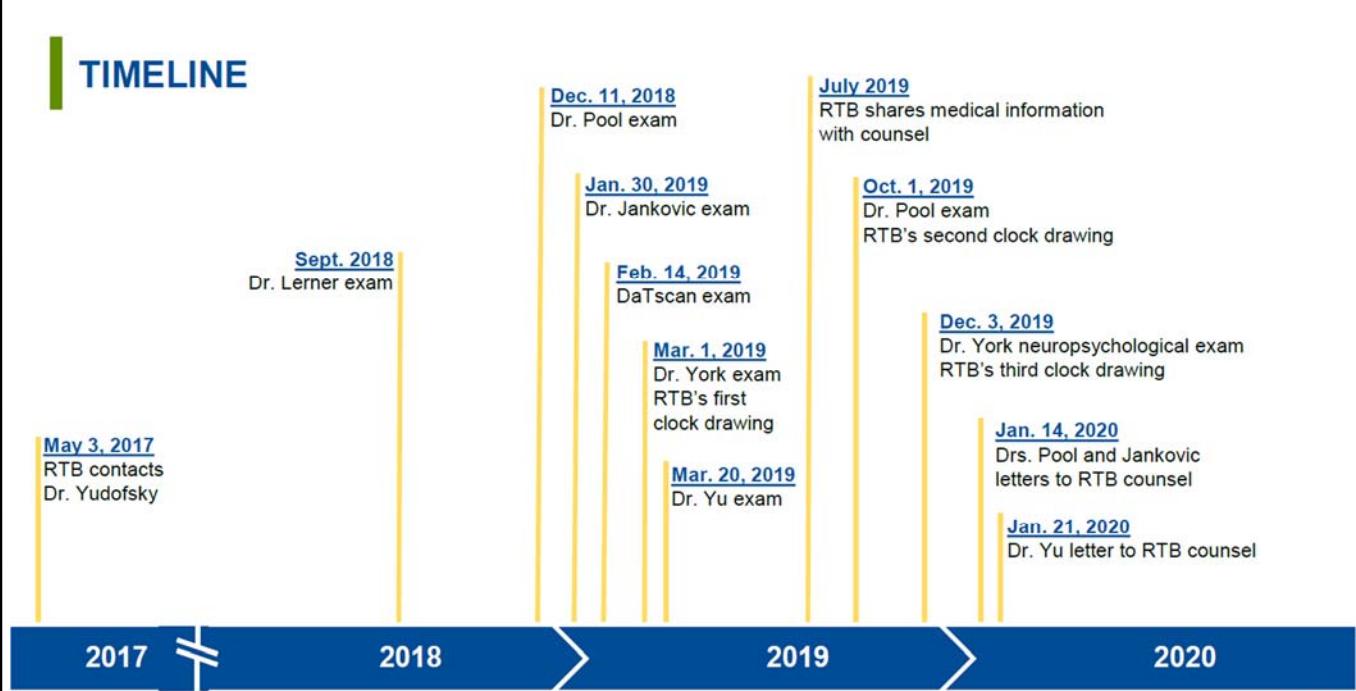
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³ Unlike initial BOP competency evaluations, these competency restoration evaluations are conducted almost entirely at FMC Butner (in North Carolina) and MCFP Springfield (in Missouri).

1 medical records, combined with the rigors of the adversarial process, will ensure that the Court, as
 2 factfinder, will be afforded the fullest picture of the circumstances that bear on whether Defendant is
 3 truly incompetent. Although the facts informing the government's skepticism will be further developed
 4 throughout these competency proceedings, it is worth orienting the Court to some of them at the outset.

5 **A. The Timing of Defendant's Claims**

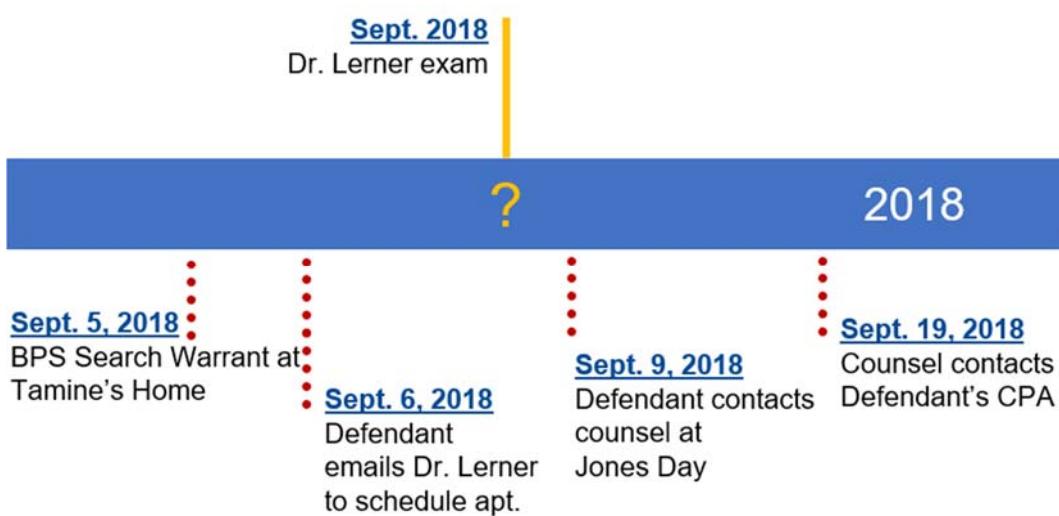
6 Defendant offers only the information he wants the Court to see, and not the information to put
 7 those events in proper context. Like the instant Motion, the timeline Defendant shared with the
 8 government pre-indictment (and replicated below) omits relevant contemporaneous activities that are
 9 probative of his mental capacity and, frankly, cast doubt on Defendant's narrative.



22 Defendant's efforts to thwart his detection, investigation, and prosecution by law enforcement
 23 have been long-standing. As early as 2010, he directed Evatt Tamine, his professional nominee, to
 24 "[o]perate as much as possible in a paperless manner—such that if someone were to come in your door
 25 unannounced everything would be in encrypted digital form." Ex. 2 at 2. He further instructed Tamine
 26 that "[a]lthough you have several personal friends in Houston that I am sure you want to maintain,
 27 please restrict your contact with the USA generally such that except for these few—you tend to fade into
 28 the background." *Id.* at 3. Defendant even gave Tamine detailed instructions on how to smuggle
 29

1 incriminating electronically stored information into Bermuda. Ex. 3 (“For sure I would expect that you
2 would not be connecting thru the USA.”). In 2011, Defendant expressed concern about his collateral
3 exposure if Robert Smith, his business partner, had a “nasty divorce” and, in 2013, he even directed
4 Tamine to get a key deposition transcript from the divorce proceedings. Ex. 4; Ex. 5. The Indictment, at
5 ¶ 194, alleges that Defendant learned of the instant investigation in or about June 2016 and, when
6 Defendant’s prior nominee subsequently died, Defendant directed Tamine to make numerous trips to the
7 former nominee’s home to destroy records, which is the subject of Counts 38 & 39. Ex. 6 at 2-3.

8 Evidence of Defendant's early claims of neurocognitive problems cannot be appreciated without
9 considering other events occurring at the time. For example, on September 5, 2018, the Bermuda Police
10 Service raided Tamine's home, invading Defendant's secret offshore world. It was the very next day
11 that Defendant reached out to his urologist, Dr. Seth Lerner, to schedule an appointment. Ex. 7. This is
12 significant because, although Defendant has not disclosed the exact date of the appointment, Defendant
13 claims that Dr. Lerner was the first doctor to witness his symptoms.⁴ Although Defendant has thus far
14 refused to fully disclose his historical medical records, he has apparently suffered his share of health
15 problems over the years. It is notable that none of his doctors—not his general practitioners,
16 oncologists, cardiologists, or anyone else—noted dementia symptoms until after the authorities executed
17 a search warrant on Tamine's home. A fuller timeline might look like this:



⁴ Although counsel has not indicated when they began representing Defendant, a privilege log provided by Defendant’s company shows communications between Defendant and his Jones Day attorneys as early as September 9, 2018 and, by September 18, Defendant’s attorneys were in touch with his CPA. Ex. 8; Ex. 9.

1 **B. Defendant's Financial Ties to Baylor and Relationship with Dr. Stuart Yudofsky**

2 Defendant has donated tens of millions of dollars to the Baylor College of Medicine. Ex. 10.

3 Defendant also approved another million-dollar donation from Reynolds a few days after he was
4 examined by Dr. James Pool, which the Motion cites as the first doctor to diagnose Defendant with
5 dementia and refer him to further specialists. Ex. 11. The bulk of Defendant's Baylor donations (\$25M)
6 were made between 2011 and 2014 to fund Dr. Stuart Yudofsky, a Baylor psychiatrist and Chairman of
7 the Scientific Advisory Board of the Brockman Medical Research Foundation. Ex. 12 at 3-5.8 Although the Indictment alleges that Defendant was aware of the current investigation in 2016,
9 Defendant offers (and offered to the government prior to indictment) a 2017 email between him and Dr.
10 Yudofsky as supposed evidence that he had symptoms before his motive to feign dementia ripened. The
11 Motion describes Dr. Yudofsky, who is a neuropsychiatrist, as Defendant's "friend." However, it
12 declines to note that he is intimately involved in Defendant's personal life, professionally indebted to
13 Defendant, and well acquainted with Tamine.14 As alleged in the Indictment, Tamine served as Defendant's professional nominee and wrote
15 annual performance appraisals for Defendant. Indictment at ¶ 10. In his 2011 evaluation, Tamine told
16 Defendant that his communications with Dr. Yudofsky and others were "undertaken with the requisite
17 degree of authority, i.e. I do not believe that anyone has any basis to suggest that I am merely carrying
18 out your instructions - whatever they might privately believe," thereby suggesting that Dr. Yudofsky
19 knew Tamine was merely Brockman's nominee. Ex. 13 at 3. Tamine also told Defendant that his
20 rapport-building with Dr. Yudofsky "work[s] as a strong barrier against an attack from the IRS." *Id.* In
21 his 2016 evaluation, Tamine tells Defendant that he "helped Stuart out of a position he found very
22 difficult and worrying"⁵ and noted that his relationship with Dr. Yudofsky was "very strong." Ex. 6 at
23 3-4.24 The years of rapport-building may have been drawn upon during a 2017 crisis. On July 30,
25 2017, Tamine emailed Defendant a memorandum on issues to deal with Bermuda Commercial Bank
26 freezing Defendant's accounts. Ex. 15. One of the problems Tamine identified was that he was
2728 ⁵ The issue appears to be related to who would succeed Dr. Yudofsky after he retired. Ex. 14.

1 becoming subjected to increased scrutiny and proposed that he no longer travel to the United States with
 2 a computer or telephone and, instead, keeping “all I need at Stuart Yudofsky’s office including a
 3 phone.” Ex. 16 at 4-5. Defendant concurred with the proposal. Ex. 15.

4 It is important to note that despite Dr. Yudofsky’s expertise and close relationship with
 5 Defendant, he took no action other than the single emailed response to Defendant’s email. Defendant
 6 has provided no evidence that Dr. Yudofsky examined Defendant, provided a referral, or engaged in any
 7 further correspondence on the subject. Indeed, despite Defendant’s apparent concern in the May 3, 2017
 8 email, he sought no further medical treatment or evaluation until after the search of Tamine’s house in
 9 September 2018.

10 Defendant’s and Dr. Yudofsky’s inaction raise the question of whether Defendant’s email was
 11 designed to seek medical advice or create a paper trail. That concern is elevated because Defendant has
 12 a significant history of generating fraudulent correspondence for use in future proceedings. For
 13 example, on June 12, 2011, Defendant wanted to explore selling Reynolds but needed to justify why he,
 14 and not the trust that owned Reynolds on paper, was running the deal. To solve this problem, he used
 15 his encrypted email system to order Tamine, the “trustee” of the trust that owns Reynolds on paper, to
 16 send Defendant a letter asking Defendant to explore the potential sale. Ex. 17. Defendant even dictated
 17 the words Tamine should use in the letter to Defendant. *Id.*

18 The evidence suggests that on at least one other occasion, Dr. Yudofsky was the recipient of
 19 planted correspondence orchestrated by Defendant. On August 1, 2015, Defendant sent Tamine an
 20 encrypted email asking Tamine to send Dr. Yudofsky “an open email” that Tamine had been considering
 21 the formation of a medical research foundation and inviting Dr. Yudofsky to be the chair. Ex. 18.
 22 Tamine sent an unencrypted email to Dr. Yudofsky stating exactly that on August 13, 2015. Ex. 19.

23 Taking all of this into account—the close personal relationship between Defendant and Dr.
 24 Yudofsky, the \$25M gift by Defendant to Dr. Yudofsky’s employer, the fact that Defendant felt
 25 comfortable storing Tamine’s communications devices (devices that he was afraid might be seized at the
 26 U.S. border) at Dr. Yudofsky’s office, and Defendant’s history of planting fraudulent correspondence,
 27 Defendant’s isolated email to Dr. Yudofsky in May 2017 should not be viewed as conclusive of whether
 28 Defendant actually suffered symptoms on that date.

1 **C. Defendant's Contemporaneous Behavior was Inconsistent with Present Claims**

2 One of Defendant's lawyers described Defendant as a man who "has consistently been unable to
 3 assist in his defense." Romatowski Decl. (ECF No. 64-3) at ¶ 11.⁶ His doctors describe Defendant as a
 4 man with an IQ in freefall. Yet, while presenting to his defense attorneys and doctors as a man of
 5 rapidly diminishing mental capacity, signs of a more robust mental acuity trail in his wake.

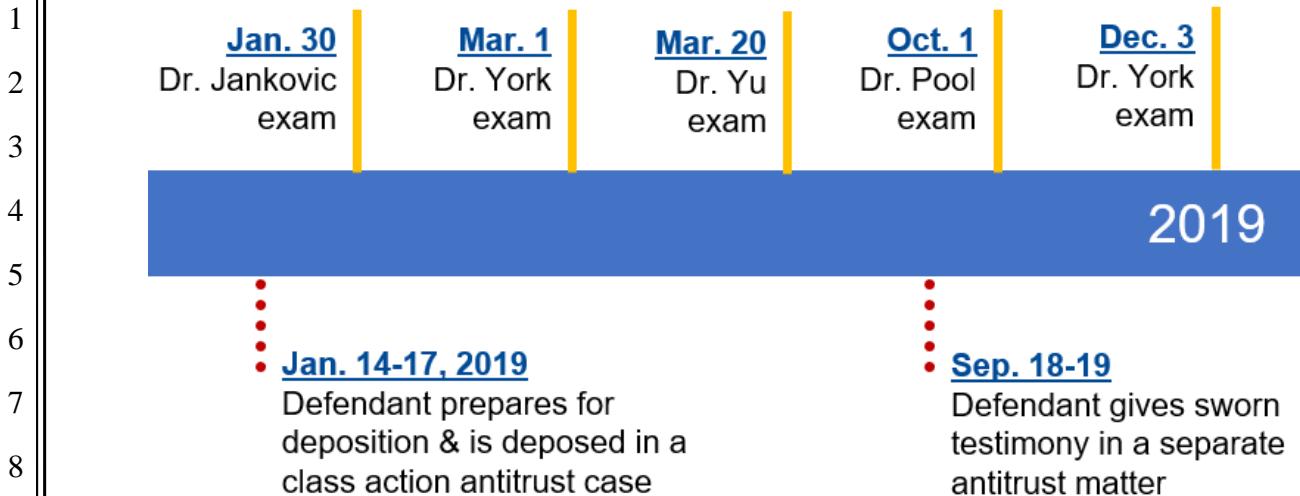
6 In between his visits with the Baylor team of doctors, Defendant engaged in significant activities
 7 related to running Reynolds.⁷ The most mentally taxing may have been being deposed in January 2019
 8 as the CEO of a multibillion-dollar company accused of engaging in anticompetitive practices. Ex. 21.
 9 In this deposition, Defendant said that he prepared with his civil attorneys for two days in advance,
 10 apparently to great effect. *Id.* at 11. In the deposition, Defendant gave cogent answers, often
 11 demonstrating a superior knowledge of the documents than the examiners themselves. *Id.*⁸ Then, in
 12 September 2019, Defendant provided sworn testimony in a separate antitrust matter, again giving long
 13 and cogent answers. The attorneys who questioned him in those proceedings observed nothing unusual
 14 or out of the ordinary in Defendant's ability to respond to the questions posed, and the lawyers who
 15 represented him in those matters did not convey any of the difficulties of which current defense counsel
 16 now complains. It is noteworthy that the Defendant's sworn testimony in these antitrust matters, in
 17 January and September 2019, were within weeks of medical evaluations by Doctors Jankovic and Pool,
 18 and yet Defendant and his civil attorneys never raised Defendant's alleged mental incapacity or decline
 19 as an issue during the proceedings. Furthermore, the government does not know if Defendant shared
 20 news of his deposition performance with the doctors upon whom he now relies because Defendant has
 21 thus far refused to provide the relevant medical discovery.

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23 ⁶ Notwithstanding, between September 2018 and March 2020, Defendant and Romatowski had
 24 eleven in-person meetings, each "several hours in length," in addition to "countless meetings . . . by
 25 telephone." *Id.* at ¶ 5.

26 ⁷ And significant leisure. Between the medical appointment he now describes, Defendant
 27 emailed his yacht captain to reminisce about the excellent tides they had on a trip over 18 months prior,
 28 Ex. 21, and arrange future travel logistics. Ex. 22; Ex. 23.

26 ⁸ The deposition is replete with examples, but some are on pp. 10-23 (explaining his trust
 27 structures); 78-79 & 312-13 (explaining relevant legal requirements); 116 (interpreting contract); 151-53
 28 (explaining software); 160 (explaining why he only retains 6-12 months of his emails); 227-32
 (explaining the inefficiency of internal accounting); 315-16 (navigating a privilege issue); 334-39
 (explaining "opcodes" in detail); 350 ("As you probably can tell, I'm – I'm into the details, big time.").



Defendant now reports further mental evaluation and a prognosis of marked decline. But the observations of his doctors are inconsistent with his continued ability, at least until he was indicted, to run his company. Throughout 2020, Defendant penned numerous emails suggesting he is still able to function on a higher level than most. In recent emails, Defendant demonstrates a command of his business. *See, e.g.*, Ex. 24 (Defendant identifies risk associated with an acquisition, noting the slowing of new car sales), Ex. 25 (Defendant discusses bid and makes teaching points to Reynolds's President), Ex. 26 (after announcing a new COO, Defendant tells him they need to talk every day about any important decision).

Defendant made it clear to Reynolds associates that he was not leaving and remained an integral part of his company. On May 10, 2020, he drafted a lengthy memo to Vice-Chairman Robert Nalley outlining his plans for the company. Ex. 27. Nalley was the first employee Defendant hired when he started the company and had been a board member and President for decades. In the email, Defendant tells Nalley that he is letting other executives take bigger roles because of "fatigue—plus recognition that I am in the final 20 percent of my life (if I am lucky)" but that he planned on working four to five years "helping teach the next generation everything I know about how to run the company efficiently." *Id.* at 1-2.

The discrepancy between the picture Defendant presented to doctors, the government, and this Court, and the manner in which he lived his life is most starkly revealed by in the June 3, 2020 reorganization of the executive structure of Reynolds. This reorganization took place almost two

1 months after attorneys for the defendant told the government that he was so impaired that he should not
 2 even be indicted. Evidence of such impairment, however, was entirely absent from the reorganization of
 3 Defendant's company. While other executives were shuffled around, Defendant retained the positions
 4 of Chairman and CEO. Ex. 28 at 2. While Defendant did say his focus would be on training the new
 5 leadership, he informed the new COO that "you and I should be talking every day about any decision of
 6 importance that is cooking." Ex. 26. Correspondence like this, during a period in time when his lawyers
 7 represented that Defendant was so impaired that he could not assist them, raises considerable question
 8 about Defendant's claim.

9 **IV. THE INAPPROPRIATENESS OF EVALUATING THIS ISSUE PRE-INDICTMENT**

10 In passing the Insanity Defense Reform Act of 1984, Congress created a statutory framework for
 11 the evaluation of competency claims. It empowered the Courts, not prosecutors, to make competency
 12 determinations. Nevertheless, Defendant now complains that the United States declined his invitation to
 13 investigate Defendant's mental state prior to indictment. Putting aside evidence described herein, such
 14 an investigation would have been inappropriate pre-indictment. Even if the government agreed with
 15 Defendant's diagnosis, but disagreed on its forensic import (i.e. whether Defendant was capable of
 16 providing effective assistance), a pre-indictment investigation would have served as a delay tactic, as
 17 any disagreement could only be settled by the Court, as Congress intended, post-indictment. The delay
 18 would be particularly injurious in the event Defendant truly suffers from degenerative ailments. For all
 19 these reasons, the government appropriately declined.

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V. CONCLUSION

The competency statute and constitutional due process requires the Court hold a competency hearing on this record. That hearing, however, should not occur until Defendant is subjected to further evaluation by independent medical experts who are afforded the full scope of relevant information. Therefore, the Court should decline to schedule a competency hearing until after it has determined a schedule for the events that must precede such a hearing. The United States will soon file a separate motion requesting discovery and medical examinations of Defendant as described herein.

Respectfully submitted this 15th day of December, 2020,

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